BRIEF IN SUPPORT OF PETITION.

Title VII, Sections 901-917 of the Revenue Act of 1936 (49 Stat. 1747, 7 U. S. C. A., par. 623, note 644-659), provides for the recovery of amounts collected under the Agriculture Adjustment Act.

Section 902 (7 U. S. C. A., par. 644) prescribes the conditions on which refunds shall be made, placing the burden on the taxpayer to establish that he has not passed on the tax or been relieved of the burden.

Section 905 (par. 647) provides that District Courts and the Court of Claims shall have jurisdiction for recovery of amounts collected as floor stocks taxes.

Section 907 (par. 649) establishes certain rules of evidence and presumptions to be used in administrative proceedings for recovery of amounts collected as processing taxes.

The Supreme Court in *Anniston Mfg. Co.* v. *Davis* (*supra*), held the recovery procedure constitutional.

Section 907 establishes presumptions, which can be rebutted, for processing tax recoveries. This section does not apply to floor stocks taxes and there are no presumptions established by statute for floor stocks taxes.

Despite the broad language of Section 902, it should not be construed as intended to deny a refund in any case where a claimant is constitutionally entitled to it—*Anniston Mfg. Co.* v. *Davis* (*supra*).

A.

EIGHTH CIRCUIT HAS ADOPTED THE GOVERNMENT'S DEMAND THAT UNDER SECTION 902 ANY INCREASE IN PRICE IS UNREBUTTABLY PRESUMED TO INCLUDE THE TAX WITH THE RESULTING SHIFTING OF THE TAX BURDEN.

In defending floor stocks tax recovery actions under Section 902, the Government repeatedly has urged upon the courts that

> "An increased selling price creates a presumption that the tax has been passed on."

The Court, in the instant opinion, is the first to adopt that proposition. This interpretation of the burden of proof under Section 902 is in conflict with rulings in other circuits, namely,

Hutzler Bros. v. *United States* (supra)

in which the Court held, p. 804:

> "The Government takes the position * * * ; that if the mere fact can be shown that prices have been raised any time subsequent to the imposition of the tax, then there is a presumption that the price increase was adopted to offset * * * the tax * * *"
>
> "But, of course, the obvious fallacy of such an argument is that it completely ignores the numerous other factors, which, as has been disclosed in this case, were the bases for the increased prices * * *"
>
> "One might give, ad infinitum, examples of the reductio absurdum of the theory which the Government is here asserting. *I know of no decision which goes to the length which the Government now asks this Court to go.* * * * The obvious result would be to defeat, by an arbitrary ruling of the Administrative branch of the Government, the very mandate of the Supreme Court in United States v. Butler, supra, to the effect that the tax was invalid." (Italics supplied.)

This refusal to establish a presumption as announced in the *Hutzler Bros. case* has been followed and quoted with approval in

1. 6th Circuit Court of Appeals,
   Cheek v. *United States,* 126 F. (2d) 3;
2. 7th Circuit Court of Appeals,
   C. B. Cones & Sons Mfg. Co. v. *United States* (supra);
3. District Court, California,
   La Yebona Co. v. *United States,* 1942 Prentice Hall, 62,546 (D. C. Calif.), appealed by United States, dismissed 127 F. (2d) 864.

B.

THERE WAS NO SHIFTING OF THE TAX BURDEN WHERE SELLING PRICES WERE INCREASED AFTER AUGUST 1, 1933, IN ORDER TO REALIZE THE MARKET VALUE OF COTTON GOODS ON JULY 30, 1933, THE DAY PRECEDING THE TAX.

The petitioner alleged in its petition, and the evidence revealed that the market value of the cotton content merchandise on July 30, 1933, was not realized on the sale of this merchandise subsequent to August 1, 1933, the date the floor stocks tax became effective.

In *C. B. Cones & Sons Mfg. Co.* v. *United States* (supra), on an identical proposition, the 7th Circuit held that the *tax burden was not shifted;* and the *Cones case* has been quoted with approval by the 4th Circuit in *Arkwright Mills* v. *Comm.*, 127 F. (2d) 465.

The facts of the *Cones case* were identical with those of the instant case in that (1) floor stocks tax recovery under Section 902 was at issue (2) there was a price increase in August, 1933 (3) while the August prices were higher than the July prices (4) the inventory Market Value as of July 30, 1933 was not realized.

This ruling of the 7th Circuit was called to the attention of the Circuit Court in the instant case, but disregarding it, the Court said (R. 73).

"* * * *it is not controlling here.*" (Italics supplied.)

The *Cones case* established that the mere increase of selling prices to recover the market value of the goods before the tax does not shift the burden of the tax to the customer.

In the *Cones case,* as in the instant case, the Government contended that there was a presumption that the tax had been passed on because of the price increase. This proposition was denounced by the Court in the *Cones case.*

That there is need for this question to be settled by this Court by granting this petition is further revealed by the fact that the three cases quoted by the Circuit Court in the instant case as supporting its announced "presumption" at Record page 73, are also the same three cases which the

7th Circuit Court in *C. B. Cones & Sons Mfg. Co.* (supra) at pages 533, 534 reviews and holds as not being authority for a "presumption."

These cases are *Honorbilt Products* v. *Comm.* (supra), *Luzier's, Inc.* v. *Nee* (infra), and *C. M. McClung & Co.* v. *United States* (infra). (Cases discussed hereinafter.)

Therefore, we have a most confusing and conflicting interpretation of the burden of proof under Section 902, the 8th Circuit in the instant case holding the above three cases supports its "presumption" and the 7th Circuit holding in the *Cones case* that these same three cases are not authority for a "presumption."

C.

THE CIRCUIT COURT EVOLVES A PRESUMPTION AGAINST PETITIONER UNDER TITLE VII.

There Are No Authorities for the Presumption Decreed by the Circuit Court.

This opinion in the instant case announced a foreign and startling doctrine in holding that an increase in selling price at the incident of the tax and the collection of the increased price shifted the burden of the tax, and that the single fact of the price increase is the

"concrete definite controlling consideration" (R. 73).

This pronouncement of this presumption is the first time such a judicial interpretation ever has been made of the taxpayer's burden under Title VII of the Revenue Act of 1936 and Sections 902 and 907 thereof (supra).

The petitioner has cited and quoted authorities herein in which "no presumption" was determined existing as a part of burden under Section 902.

The cases relied on by the Circuit Court in its Opinion (R. 73) *are not authority* for such a harsh and confiscatory application of the Congressional intent in establishing the burden of proof under Section 902. These cases relied upon (R. 73) are as follows:

Anniston Mfg. Co. v. *Davis* (supra), in which this Court, speaking through Mr. Chief Justice Hughes regarding the burden of proof under Section 902, said (at p. 351),

"Despite the broad language of Section 902, we do not think that it should be construed as intended to deny a refund in any case where a claimant is constitutionally entitled to it. * * *. When the Congress requires the claimant, who has paid the invalid tax, to show that he has not been reimbursed or has not shifted its burden, the provision should not be construed as demanding the performance of a task, if ultimately found to be inherently impossible, as a condition of relief to which the claimant would otherwise be entitled. There is ample room for the play of the statute within the range of possible determination. * * *"

Honorbilt Products Co. v. *Com.*, 119 F. (2d) 797 (3rd C. C. A.)

The Court cites this case as authority for its application of the presumption as the burden under Section 902. This case establishes no such principle of law, even though there was a price increase.

The case originated in the Processing Tax Board of Review, where relief was denied because of unfavorable margins under Section 907, which were not rebutted by the taxpayer; there was also evidence that the selling price had been increased. The 3rd Circuit affirmed the Board, however, making this reservation in its opinion (page 798):

"* * * The increase was more than sufficient to take care of the tax and *there is nothing in the record to show that the increase in price was due to any increase in the cost of raw materials, of labor or of manufacture generally.*" (Italics supplied.)

Therefore, the *Honorbilt case* even under Section 907, which establishes statutory margins, permits of proof to rebut the presumption.

Luzier's Inc. v. *Nee*, 106 F. (2d) 130 (8th C. C. A.).

This case involved a claimed overpayment of cosmetic excise tax. The facts were Luzier *collected* the excise tax from its customers in advance of payment; the amount was

understood between the parties to be for that purpose and was so paid by the customers. 10 per cent was added to the price and the sales invoice had a stamped notation:

> "Service charge covers increased income tax, increased postal rates, abandoned delivery charges, *excise taxes,* and emergency expenses."

Thus the facts of the case and basis of decision were totally dissimilar to those of the instant case.

> *C. M. McClung Mfg. Co.* v. *United States,* 33 F. Supp. 464 (Ct. Claims).

This is the last case cited by the Circuit Court. McClung purchased goods after August 1, 1933, and adjusted his selling price on the basis of new merchandise which included the processing tax. The taxpayer had paid a floor stocks tax on the goods he had on hand August 1. Some of the inventory was sold at the old price and some at the new which included the tax. The taxpayer offered no proof as to how much of the inventory was sold at the old price, and the Court held that in the absence of such proof, no recovery could be had for that portion of the inventory.

Therefore, neither the *Anniston, Honorbilt, Luzier* or *McClung cases* (supra) are authority for this new rule announced by the Circuit Court in the instant case.

The conclusion of law decreed by the Circuit Court that

> "an increase in selling price shifts the burden of the tax"

rests upon a wrong construction of law as applied to the controlling elements of the case and to the petitioner's burden of proof as contained in Title VII, Section 902, Revenue Act of 1936, and the judgment should be reversed.

WHEREFORE, that the writ of certiorari should be granted is respectfully submitted.

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